A

JITENDER SINGH PAGAR SINGH & ORS

v.

PENTADBIR TANAH WILAYAH PERSEKUTUAN & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KANG HWEE GEE JCA
CLEMENT SKINNER JCA

C [CIVIL APPEALS NO: W-01-21-2006 & W-01-247-2010]
18 MAY 2011

ADMINISTRATIVE LAW: *Judicial review - Application for - Delay of three years - Whether contravened O. 53 r. 3(6) of the Rules of the*
D *High Court 1980 - Whether compliance with time frame was fundamental*

LAND LAW: *Acquisition of land - Objection against amount of compensation awarded - Whether compensation considered in light of current law - Whether requirement that High Court judge must be guided*
E *by assessors infringed art. 13 of the Federal Constitution - Whether reasoning given was sound*

The appellants' lands were subjected to acquisition under the Land Acquisition Act 1960 ('the Act') for the purposes of a
F project known as 'Projek KL Monorail'. The lands were gazetted for acquisition and the appellants were awarded compensation. The appellants objected to the amount of the compensation saying it was inadequate and the matter was referred to the High Court under a land reference action. The High Court judge referred to
G s. 40D of the Act and held that he was bound to accept one of the two opinions of the assessors, the government valuer and the private valuer, sitting with him. The judge adopted the principle that where both valuers had applied the correct principles of valuation, the court was to adopt the valuation that favoured the
H landowners and thus, increased the amount of compensation awarded. However, the appellants were directed to pay 50% of the Land Administrator's costs and the fee of the private valuer. Subsequently, three years after the pronouncement of the decision, the appellants filed an application for judicial review for a
I declaration that s. 40D(2) and (3) of the Act was null and void

and for an order that the decision in respect of the compensation award be set aside. The appellants contended that their right to receive adequate compensation under art. 3 of the Federal Constitution ('the Constitution') had been infringed in the land reference. The High Court judge in the judicial review application dismissed the appellants' application. Hence, the present appeals.

Held (dismissing the appeals)
Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The judicial review application was not maintainable by reason of the express provision in s. 40(3) of the Act. Further, such an attempt to obtain a different outcome by way of an application for judicial review after more than three years clearly contravened O. 53 r. 3(6) of the Rules of the High Court 1980 ('RHC') which requires an application for judicial review to be made promptly. Compliance with the time frame prescribed by the RHC is fundamental as it goes to jurisdiction. (para 16)

(2) In the instant case, the Act to be applied was that as amended by the Land Acquisition (Amendment) Act 1997. A land reference is to be heard by a High Court judge sitting with two assessors to determine the fair and reasonable amount of compensation payable arising from an acquisition. The High Court judge was to adopt the opinion of the assessors or elect to adopt the opinion of one of them, if they differ. The judge could not come to a valuation different from the opinion of the assessors, or if different, from either one of them. The High Court judge hearing the land reference in the present case had complied with the law as it now stood. (paras 20 & 21)

(3) Limiting the discretion of a High Court judge hearing a land reference to the opinion of the assessors appointed to assist him, alternatively by the opinion of one of the assessors, did not infringe art. 13 of the Constitution. The limitation requiring him to be guided by such an opinion was warranted as a High Court judge is no expert in determining the value of land. Thus, the requirement that the amount of compensation to be awarded is to be based on an opinion given by the experts in this particular field, *ie*, a valuer, in

A determining the market value of the land acquired and the amount of compensation to be awarded was well founded. (para 24)

(4) In the instant case, the High Court judge made his own
B determination on the compensation to be awarded when faced with the different opinion of the assessors. He accepted the higher of the two and he was right in doing so. The reasoning given for preferring one over the other was sound and should not be disturbed by an appellate court. Further, on the issue
C of costs in the land reference, the High Court judge was right in involving s. 51 of the Act by not awarding costs to the appellants and in making the order of costs. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

D Tanah perayu-perayu telah diambil di bawah Akta Pengambilan Tanah 1960 ('Akta tersebut') bagi tujuan suatu projek yang dikenali sebagai Projek KL Monorail. Tanah tersebut diwartakan untuk pengambilan dan perayu-perayu diberikan pampasan. Perayu-perayu membantah terhadap jumlah pampasan menyatakan bahawa
E ia tidak mencukupi dan perkara tersebut dirujuk kepada Mahkamah Tinggi di bawah tindakan rujukan tanah. Hakim Mahkamah Tinggi merujuk kepada s. 40D Akta tersebut dan memutuskan bahawa beliau terikat untuk menerima salah satu daripada dua pendapat penilai, penilai kerajaan dan penilai swasta, yang bersidang bersama
F beliau. Hakim menggunakan prinsip bahawa di mana kedua-dua penilai telah menggunakan prinsip penilaian yang betul, mahkamah perlu menggunakan penilaian yang memihak kepada pemilik tanah dan dengan itu, meningkatkan jumlah pampasan yang diberikan. Walaubagaimanapun, perayu-perayu diarahkan membayar 50% kos
G Pentadbir Tanah dan fi penilai swasta. Kemudian, selepas tiga tahun pengumuman keputusan, perayu-perayu memfailkan permohonan semakan kehakiman untuk deklarasi bahawa s. 40D(2) dan (3) Akta tersebut adalah batal dan tidak sah dan untuk perintah bahawa keputusan berkaitan dengan pemberian pampasan
H diketepikan. Perayu-perayu menghujah bahawa hak mereka untuk menerima pampasan yang mencukupi di bawah perkara 3 Perlembagaan Persekutuan ('Perlembagaan') telah dicabul dalam rujukan tanah tersebut. Hakim Mahkamah Tinggi di dalam permohonan semakan kehakiman menolak permohonan perayu-
I perayu, sekaligus membangkitkan rayuan-rayuan di sini.

Diputuskan (menolak rayuan-rayuan)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Permohonan semakan kehakiman tidak boleh dikekalkan disebabkan oleh peruntukan jelas dalam s. 40(3) Akta tersebut. Selanjutnya, percubaan sedemikian untuk mencapai keputusan yang berbeza melalui permohonan semakan kehakiman selepas lebih dari tiga tahun jelas bertentangan dengan A. 53 k. 3(6) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang memerlukan permohonan untuk semakan kehakiman dibuat secepat mungkin. Pematuhan kepada tempoh masa yang dinyatakan oleh KMT adalah asas kerana ia melibatkan bidang kuasa.

(2) Di dalam kes ini, Akta yang perlu diaplikasi adalah yang dipinda oleh Akta Pengambilan Tanah (Pindaan) 1997. Rujukan tanah mesti dibicarakan oleh Hakim Mahkamah Tinggi bersidang bersama dua penilai untuk menentukan jumlah pampasan yang adil dan munasabah yang mesti dibayar akibat daripada pengambilan tersebut. Hakim Mahkamah Tinggi perlu menggunakan pendapat penilai atau memilih untuk menggunakan pendapat salah seorang penilai di antara mereka, jika berbeza. Hakim tidak boleh membuat penilaian yang berbeza daripada pendapat penilai, atau jika berbeza, daripada salah seorang di antara mereka. Hakim Mahkamah Tinggi yang membicarakan rujukan tanah di dalam kes ini telah mematuhi undang-undang semasa.

(3) Menghadkan budi bicara Hakim Mahkamah Tinggi yang membicarakan rujukan tanah kepada pendapat penilai yang dilantik untuk membantu beliau, secara alternatif melalui pendapat salah seorang daripada penilai, tidak mencabuli perkara 13 Perlembagaan. Penghadan memerlukan beliau diberi panduan melalui pendapat sedemikian adalah wajar kerana Hakim Mahkamah Tinggi bukan pakar dalam menentukan nilai tanah. Dengan itu, keperluan bahawa jumlah pampasan yang diberikan mesti didasarkan atas pendapat yang diberikan oleh pakar dalam bidang khusus ini, iaitu penilai, dalam menentukan nilai pasaran tanah yang diperoleh dan jumlah pampasan yang perlu diberikan adalah berasas.

A **(4)** Di dalam kes ini, Hakim Mahkamah Tinggi membuat keputusannya sendiri berkaitan pampasan yang akan diberikan apabila menghadapi dua pendapat penilai yang berbeza. Beliau menerima yang tertinggi di antara kedua-duanya dan beliau memutuskan dengan betul. Alasan yang diberikan untuk
B memihak kepada satu dan bukan yang satu lagi adalah berasas dan tidak boleh diganggu oleh mahkamah rayuan. Selanjutnya, atas isu kos dalam rujukan tanah tersebut, Hakim Mahkamah Tinggi memutuskan dengan betul dalam melibatkan s. 51 Akta tersebut dengan tidak memberikan kos kepada perayu-perayu
C dan dalam membuat perintah bagi kos.

Case(s) referred to:
Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor [1983] 2 CLJ 7; [1983] CLJ (Rep) 266 ***(refd)***

D **Legislation referred to:**
Federal Constitution, art. 13
Land Acquisition Act 1960, s. 8, 12, 38, 40D(1), (2), (3), 51
Rules of the High Court 1980, O. 53 r. 3(6)

(Appeal No: W01-21-2006)
E *For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co*
For the respondent - Roslan Abu Bakar SFC; AG's Chambers

(Appeal No: W01-247-2010)
For the appellant - Balwant Singh Sidhu; M/s Balwant Singh Sidhu & Co
F *For the respondent - Shamsul Bolhassan SFC; AG's Chambers*

[Appeals from High Court, Kuala Lumpur; Land Reference No: S3(S6)-15-13-2001; Originating Summons No: R1-24-06-2009]

Reported by S Barathi

G

JUDGMENT

H **Zaleha Zahari JCA:**

[1] In this judgment Appeal No. W-01-21-2006 will be referred as "the Land Reference Appeal" whilst Appeal No. W-01-247-2010 will be referred as "the 2010 appeal". Unless expressly
I mentioned, reference to any legal provision refers to the provisions of the Land Acquisition Act 1960 ("the Act").

[2] What led to the land reference which is the subject matter of the Land Reference Appeal, and the appellants filing an application for judicial review on 4 March 2009 to set aside the decision of the High Court judge dated 15 December 2005 in respect of the land reference, (the subject matter of the 2010 appeal) was this.

Kuala Lumpur Land Reference No. S3(S6)-15-13-2001

[3] The appellants' lands [(ie, Lots 176 held under Grant No. 36856, Lot No. 267 held under Grant No. 28925 and Lot 268, held under Grant No. 28926 situated at Section 72, Jalan Berhala, Brickfields, Bandar Kuala Lumpur ("the said lands")] were subjected to acquisition under the Act for the purposes of a project known as "Projek KL Monorail" ("the project").

[4] The said lands were gazetted for acquisition pursuant to s. 8 on 17 February 2000 *vide* Warta Kerajaan Persekutuan No: 1636. The total land area of the said lands to be acquired was 165,217.92 square feet. It is not in issue that there were then 109 squatters in occupation of the said lands.

[5] The Land Administrator conducted an enquiry pursuant to s. 12 to determine the amount of compensation payable to the appellants arising from the said acquisition. At the conclusion of the enquiry, the Land Administrator awarded compensation to the appellants at a rate of RM193.61 per square foot making a total award of RM31,987,351.45.

[6] The appellants objected to the amount of compensation awarded by the Land Administrator by filing Form N requesting the Land Administrator to refer the matter to the court for its determination pursuant to s. 38. The appellants contended that the compensation awarded was inadequate and that an award at a rate of RM650 per square foot as held out by their valuers, Messrs KGV-Lambert Smith Hampton, was more appropriate. The Land Administrator then referred the matter to the Registrar, Kuala Lumpur High Court by submitting Form O, which was duly registered on 15 December 2001 as Kuala Lumpur High Court Land Reference No. S3(S6)-15-13-2001.

[7] The High Court judge hearing the land reference sat with two assessors ie, Encik Phuah Tick Lai, Director, Valuation Department, Pahang ("the Government Valuer") and Encik Mohd

Basri Rahmat, a Director from HASB Consultants Sdn Bhd. ("the Private Valuer") to determine the adequacy of the compensation payable to the appellants. Based on the documentary evidence, including the valuation reports of both parties and the submissions presented, the Government Valuer and Private Valuer gave their respective opinion in writing to the High Court judge as to the market value of the said lands at the time of acquisition.

[8] Both the Government Valuer and Private Valuer applied the comparative method of valuation. Both also applied the same comparable. Factors as to location, size, date of transaction, development potential and the existence of squatters on the said lands were taken into account and adjustments made which they considered appropriate.

[9] The valuation of the Government Valuer and Private Valuer differed slightly. The Government Valuer valued the said lands at a rate of RM198 per square foot. Based on the Government Valuer's valuation the compensation payable to the appellants was RM32,713,577.32. As for the Private Valuer, he valued the said lands at a higher rate of RM201.60 per square foot. The compensation payable to the appellants applying the Private Valuer's valuation was RM33,307,932.05. There was accordingly a difference of RM594,354.73 between the Government Valuer and the Private Valuer's valuation.

[10] The learned judge in his grounds of judgment dated 3 January 2008, in considering the valuation of the Government Valuer and Private Valuer, was of the view that both valuations were equally sound, the difference being in relation to the percentage of adjustments of each factor, which was small. The learned High Court judge then referred to s. 40D, and held that he was bound to accept one of the two opinions of the assessors sitting with him. The learned judge then adopted the principle that, where both valuers had applied the correct principles of valuation, the court was to adopt the valuation that favoured the landowners. As the valuation of the Private Valuer was the higher of the two, he increased the amount of compensation awarded to the appellants from RM31,987351.45 to RM33,307.932.05, and awarded interest at the rate of 8% per annum from date of possession to date of full payment. In other words, the appellants succeeded in the land reference by obtaining an increased sum of

RM1,320,580.60 as compensation arising from the said acquisition. Be that as it may, on the issue of costs, by reason of the amount claimed by the appellants being excessive compared with the amount awarded by the court, the High Court judge then invoked s. 51. The High Court judge directed the appellants to pay 50% of the Land Administrator's costs and the fee of the Private Valuer at a rate of RM500 per day. The decision of the High Court dated 15 December 2005 is the subject matter of the Land Reference Appeal.

Kuala Lumpur High Court Originating Summons No. R1-24-2009

[11] On 4 March 2009, (ie, about three years after the Kuala Lumpur High Court judge pronounced his decision in the Land Reference, and one year three months of the High Court judge's grounds of decision) the appellants filed Kuala Lumpur High Court Originating Summons No: R1-24-06-2009, an application for judicial review for a declaration that s. 40D(2) and 40D(3) are null and void and for an order that the decision of the High Court judge dated 15 December 2005 in respect of the amount of compensation awarded to the appellants in the Land Reference be set aside. On the date of the filing of the application for judicial review, the Land Reference Appeal was then still pending before the Court of Appeal.

[12] In the application for judicial review the appellant contended that their right to receive adequate compensation under art. 13 of the Federal Constitution had been infringed in the Land Reference. It was alleged that there was no independent judicial determination or exercise of judicial discretion in the Land Reference in the ascertainment of the amount of compensation due to them. This challenge was premised on the reasoning given by the learned High Court judge in the grounds of decision in the Land Reference.

[13] The High Court judge hearing the appellants' judicial review application was of the view the appellants' contentions were unfounded. She ruled that there was no abdication of duty on the part of High Court judge hearing the Land Reference and in making a determination as to the compensation to be awarded. She noted that the valuation reports of both parties were before the learned judge and the assessors appointed to assist him. It

was not correct to say that the valuation report of the appellants' valuer had not been taken into consideration. She was of the view that the learned High Court judge hearing the Land Reference had taken into consideration all evidence, submissions as well as the opinions of the two assessors sitting with him in arriving at the decision which he did. His observation of the law to be applied has to be read in context. She was of the view that the appellant's counsel had misconstrued the High Court judge's observations. She was not persuaded by the argument that the impugned provisions had stifled the exercise of judicial discretion in the making of an award of compensation and that the role of a judge had been reduced to "a mere rubber stamp". The High Court ruled that ss. 40D(2) had not deprived the appellants of their right to adequate compensation under art. 13 of the Federal Constitution. She then dismissed the appellants' application and awarded costs of RM5,000 to the respondent.

Decision

[14] We dismissed both appeals for the following reasons.

[15] The appellants had on the facts of this case exercised their legal right to object to the compensation awarded by the Land Administrator by way of a Land Reference to the High Court. The High Court judge sitting with assessors made a decision in favour of the appellants. The amount of compensation to be paid to the appellants was increased by RM1,320,580.60. Notwithstanding the express provision of s. 40(3) (editor's note: section 40(3) has been repealed by Act A575), that such a decision was "final and there shall be no further appeal to a higher court", the appellant lodged an appeal against this decision (ie, the Land Reference appeal). Not only that, pending disposal of the Land Reference appeal by the Court of Appeal, the appellants' deemed it necessary to file a judicial review application, which for all intents and purposes also relates to the amount of compensation payable to them arising from the acquisition of the said lands.

[16] We are of the view that the judicial review application is not maintainable by reason of the express provision in s. 40(3) (editor's note: section 40(3) has been repealed by Act A575). Further, such an attempt to obtain a different outcome by way of an application for judicial review after more than three years had lapsed after the High Court judge had pronounced his decision in the Land Reference, and more than a year after the grounds of

judgment had been furnished, clearly contravenes O. 53 r. 3(6) of the Rules of the High Court 1980 ("the Rules") which require an application for judicial review to be made:

> promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the respondent provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

Compliance with the time frame prescribed by the Rules is fundamental as it goes to jurisdiction (See *Mersing Omnibus Co Sdn Bhd v. The Minister of Labour & Manpower & Anor* [1983] 2 CLJ 7; [1983] CLJ (Rep) 266). On this ground alone the application for judicial review could and should have been dismissed by the High Court judge hearing the judicial review application.

[17] On the substantive arguments presented on the validity of s. 40D(1), (2) and (3), we are of the following views. We note that the provisions relating to land references as to the manner such objection is to be decided had been subjected to amendments over the years. Initially, land references was decided by a judge sitting with assessors (1960 onwards), then to a judge sitting alone (1984 onwards). As for the appellants' case, the Act to be applied is that as amended by the Land Acquisition (Amendment) Act 1997 (Act A999).

[18] The appellants' objection was in respect of the amount of compensation to be awarded to them. Sections 40A, 40B, 40C as well as 40D inserted by the Act A999 accordingly applies.

[19] Section 40D(1) and (2) states as follows:

> **Decision of the Court on compensation**
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> 40D (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.
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> (2) Where the assessors have each arrived at a decision which differs from each other than the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

[20] With effect from 1 March 1998, as submitted by the appellants' counsel, a Land Reference is to be heard by a High Court judge sitting with two assessors (one of whom shall be a valuation officer employed by the Government) to determine the fair and reasonable amount of compensation payable arising from an acquisition. The High Court judge is required to adopt the opinion of the assessors sitting with him, or elect to adopt the opinion of one of them, if they differ. The legislative intent is clear and unambiguous. A High Court judge cannot come to a valuation different from the opinion of the assessors, or if different, from either one of them.

[21] The High Court judge hearing the appellants' application for judicial review ruled the High Court judge hearing the Land Reference had complied with the law as it now stands. We agree.

[22] The question for determination is whether this provision requiring a High Court judge to accept the opinion of the assessors, or the opinion of one of the assessors sitting with him, rendered the right conferred by art. 13 of the Constitution on a landowner to be given adequate compensation, ineffective and unconstitutional?

[23] The appellants' counsel, En Balwant Singh Sidhu, argued that s. 40D was unconstitutional as judicial discretion to determine the adequacy of compensation under art. 13 had been fettered by the opinion of assessors. The exercise of judicial discretion is now limited. A judge is legally compelled to concur with the opinion of the Government Valuer and Private Valuer, or if they differ, to either one of them. He is not at liberty to arrive at any other valuation. According to En Balwant, the opinion of the Assessors, who, by qualification, are valuers, like all expert opinion, should be subjected to judicial scrutiny. He submitted that inadequate consideration was given to the valuation report submitted by the appellants in the Land Reference, the contents of which had not been subjected to cross-examination, and therefore considered as unchallenged.

[24] After careful consideration of the impugned provisions and art. 13 of the Federal Constitution as well as the submissions presented before us, we are of the view that limiting the discretion of a High Court judge hearing a Land Reference to the opinion of the assessors appointed to assist him, alternatively, by the

opinion of one of the assessors, does not infringe art. 13 of the Federal Constitution. We are of the opinion that such a provision is valid and of full legal effect. In our considered opinion the limitation requiring him to be guided by such an opinion is warranted as a High Court Judge is no expert in determining the value of land. Valuation of land clearly is not a mathematical process. In particular, potential development value is not often easy to determine in the absence of an abundance of evidence from recent transactions in respect of comparable properties. Almost invariably there emerges from the consideration of all of the facts a fairly well-defined range, sometimes blurred at either end within which the answer must lie. The opinion of those of equal competence and experience may well tend to indicate different point within that range. Ultimately, it is a matter of opinion and experience. Thus, the requirement that the amount of compensation to be awarded is to be based on an opinion given by the experts in this particular field (ie, a valuer), in determining the market value of the land that had been acquired and the amount of compensation to be awarded in our view is well founded.

[25] On the issue of the appellants' valuer not being subjected to cross examination, nothing turns on this, as, equally, the respondent's valuer had also not been subjected to cross examination. The market value of the said lands at the material time was clearly in issue. The conflicting valuation furnished by the appellants and the respondent was before the Government Valuer and the Private Valuer in arriving at an opinion for the consideration of the learned judge in determining the amount of compensation to be awarded to the appellants. The reasons given for the opinions presented by the assessors was considered by the learned judge to be sound. The opinions of assessors assisting the learned judge was very much lower than the valuation given by the appellants' valuer.

[26] The record clearly shows that the High Court judge made his own determination on the compensation to be awarded when faced with the different opinion of the assessors. He accepted the higher of the two. We are of the view that he was right in awarding the appellants the higher of the two valuations. The reasoning given for preferring one over the other is sound and should not be disturbed by an appellate court. Further, on the

A issue of costs in the Land Reference, the High Court judge was right in involving s. 51 by not awarding costs to the appellants and in making the order of costs which he did.

[27] For the above reasons both appeals were dismissed. We
B fixed costs of the 2010 appeal at RM5,000 to the respondent. The deposit to the respondent to account of costs. By reason of the Senior Federal Counsel appearing in the Land Reference Appeal not asking for costs, we made no order as to costs in respect of this appeal and directed the deposit to be reimbursed
C to the appellants.

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